Fair Comment

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NATURE OF THE DEFENSE

A quarter of a century has passed since Professor Hallen exhaustively explored the role of fair comment in actions for defamation.[1] His analysis has withstood the passing of time. A review of the subject to date shows numerous litigation and a plethora of application but little in the nature of fundamental development. This writer, a former student of the late Professor, is pleased to participate in honoring him by reconsidering this segment of his specialized subject.

At the outset it may be noted that there is still conflict and uncertainty as to the exact nature of the defense of fair comment. It has been denominated as both a right[2] and a privilege.[3] It has also been said that its exact nature is of no consequence since immunity results in either case.[4]

The English view concerning the nature of fair comment as a right is succintly stated thus:

> It is the right of everyone, not the privilege of any particular individual, to comment fairly and honestly on any matter of public interest, and the defense of fair comment is equally applicable whether the criticism be oral or written. The defense that the words complained of are fair comment on a matter of public interest is not confined to journalists or any other class of persons but is open to every defendant.[5]

Many English and some American cases and writers take the same view.[6] The view of privilege is stated as follows:

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1 Hallen, *Fair Comment*, 8 TEXAS L. REV. 41 (1929).

2 Foley v. Press Publishing Co., 226 App. Div. 535, 235 N. Y. Supp. 340, 355 (1929); Gough v. Tribune-Journal Co., Allen v. Tribune-Journal Co., 73 Idaho 173, 249 P. 2d 192 (1952).

3 Cartwright v. Herald Pub. Co., 220 S. C. 492, 68 S. E. 2d 415 (1951); Bailey v. Charleston Mail Ass'n., 126 W. Va. 232, 27 S.E. 2d 837 (1943); Griffin v. Opinion Publishing Co., 114 Mont. 502, 138 P. 2d 580 (1943); Hall v. Binghamton Press, 263 App. Div. 403, 33 N.Y.S. 2d 840 (1942); Hallen, *supra*, n. 1 at 42; Noel, *Defamation of Public Officers*, 49 COL. L. REV. 875, 878 (1949).

4 Thomas v. Bradbury, Agnew, Ltd., [1906] 2 K.B. 627, 639; PROSSER, TORTS 842 (1941); Green, *Relational Interests*, 30 ILL. L. REV. 314, 336 (1935); Note, 45 ILL. L. REV., 525, 528-9 (1950).

5 FRASER, LIBEL AND SLANDER, 105 (7th ed. 1936).

6 Foley v. Press Publishing Co., 226 App. Div. 535, 235 N. Y. Supp. 340 (1929); Gough v. Tribune-Journal Co., Allen v. Tribune-Journal Co., 73 Idaho 173, 249 P. 2d 192 (1952); Dressler v. Mayer, 22 N.J. Super. 129, 91 A.2d 650 (1952); *Cf.* O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 50 A. 2d 10,

> The Utah courts, following the great weight of authority, hold that publications dealing with political matters, public officials or candidates for office, are entitled to measurable privilege because of the public interest involved. As to this class of publications, the law raises a prima facie presumption in favor of the privilege.[7]

The difficulty of designating fair comment as a right instead of a privilege under the generally accepted Hohfeldian classification[8] has been forcibly pointed out by Professor Hallen.[9] It is obviously not a *right* in the Hohfeldian sense as it is not a legally enforceable claim on the part of the publisher that someone else do or refrain from doing a particular act. Also, there is no corresponding legal duty. The corresponding interest in this case is simply a *no right* to interfere with or prevent the fair comment from being made. The correlative of a *no right* is, of course, a *privilege*. Since the person commenting is free to comment or not as he pleases, this interest of fair comment is in reality a *privilege*.

It should be pointed out that many cases involving fair comment also involve a conditional privilege separate and distinct from the *conditional privilege* of fair comment. Thus, a true and fair report of judicial, legislative, and administrative proceedings is conditionally privileged regardless of the defense of fair comment.[10] It is hence only in those cases where the remarks or statements would otherwise be unprivileged and actionable that the defense of fair comment is significant.

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17 (1946); Van Lonkhuyzen v. Daily News Co., 203 Mich. 570, 170 N.W. 93 (1918), earlier decision, 195 Mich. 283, 161 N.W. 979 (1917); BALL, LIBEL AND SLANDER 77 (2nd. ed. 1936); GATLEY, LIBEL AND SLANDER 335 (4th ed. 1953); JONES, LAW OF JOURNALISM 102 (1940); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 303 (1906); THAYER, LEGAL CONTROL OF THE PRESS 346-347 (1944); 53 C.J.S. LIBEL AND SLANDER § 131 (1948); note, 33 A.L.R. 2d 1202-1203 (1954).

[7] Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F. 2d 20, 22 (10th Cir. 1952); *accord:* Williams v. Standard Examiner Publishing Co., 83 Utah 31, 27 P. 2d 1 (1933); Derounian v. Stokes, 168 F. 2d 305 (10th Cir. 1948); Hertzog v. United Press Ass'ns., 202 F. 2d 81 (4th Cir. 1953); Morgan v. Bulletin Co., 369 Pa. 349, 85 A. 2d 869 (1952); Cartwright v. Herald Publishing Company, 220 S. C. 492, 68 S.E. 2d 415 (1951); Preveden v. Croatin Fraternal Union of America, 98 F. Supp. 784 (W.D. Pa. 1951); Caldwell v. Crowell-Collier Publishing Co., 161 F. 2d 333 (5th Cir. 1947); De Savitsch v. Patterson, 159 F. 2d 15 (D.C. Cir. 1946); Bailey v. Charleston Mail Ass'n., 126 W. Va. 232, 27 S.E. 2d 837 (1943); Cadro v. Plaquemines, 202 La. 1, 11 So. 2d 10 (1942); Noel, *Defamation of Public Officers and Candidates,* 49 COL. L. REV. 875, 877-8 (1949).

[8] Hohfeld, *Fundamental Legal Conceptions,* 23 YALE L. J. 16 (1913).

[9] Hallen, *supra,* n. 1 at 42.

[10] Hertzog v. United Press Ass'ns., 202 F. 2d 81 (4th Cir. 1953); Mullen v. Lewiston Evening Journal, 147 Me. 286, 86 A. 2d 164 (1952); Wilson v. United Press Ass'ns., 343 Ill. App. 238, 98 N.E. 2d 391 (1951); *rehearing denied* (1951); PROSSER, TORTS 844 (1941); RESTATEMENT, TORTS §611 (1938).

The theory that comment is not a privilege is apparently based on the propostion that everybody and not just a limited few is entitled to make the criticism without liability. Irrespective of fair comment, members of a church organization, labor union, or other group have a conditional privilege to discuss internal matters and officials whereas non-members do not.[11] This enlarged freedom of comment, however, is not conclusive against the privilege terminology. As Professor Hallen pointed out,[12] in a true case of fair comment on matters of public interest, the interested group may be considered to be enlarged to include every member of the public. Hence, a true conditional privilege can exist in every member of the public to call the matter to the attention of every other member of the public.

The theoretical difference in the two approaches results in still another terminological distinction. Under the *right* theory the matter in litigation is said not to be defamatory at all,[13] whereas under the privilege theory it is said to be defamatory but not actionable because the bounds of fair comment have not been exceeded.[14] Diminishing the possibility of substantial differences in result is the fact that actual malice under either view defeats the defense of fair comment.[15] Practically, it would seem that the *right* theory would result in more control by the judge and that the *privilege* theory would accord more control to the jury.[16] If, however, as is frequently contended,[17] the result of the litigation is the same in either case, the assertion that fair comment is not defamation must simply mean that it is not *actionable* defamation. This

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[11] Loeb v. Geronemus, 66 So. 2d 241 (Fla. 1953); Emde v. San Joaquin County Central Labor Council, 23 Cal. 2d 146, 143 P. 2d 20 (1943); PROSSER, *op. cit. supra,* n. 10 at 837; RESTATEMENT, TORTS §596 (d) (1938).

[12] Hallen, *supra,* n. 1 at 61.

[13] Campbell v. Spottiswoode, 32 L.J.Q.B. 185 (1863); Dressler v. Mayer, 22 N.J. Super. 129, 91 A. 2d 650 (1952); Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S.E. 2d 209 (1943), (used both the non-libelous and privilege terminology); Kuleza v. Chicago Daily News, 311 Ill. App. 117, 35 N.E. 2d 517 (1941); Merrey v. Guardian Printing and Publishing Co., 79 N.J. L. 177, 74 Atl. 464 (1909) *aff'd* 81 N.J.L. 632, 80 Atl. 331 (1911); 33 AM. JUR. LIBEL AND SLANDER § 161 (1941); 17 RULING CASE LAW 352.

[14] "One who publishes false and defamatory matter of another is not liable therefor if (a) it is published upon a conditionally privileged occasion and (b) the occasion is not abused." RESTATEMENT, TORTS §593, quoted with approval in Griffin v. Opinion Publishing Company, 114 Mont. 502, 138 P. 2d 580, 584-5 (1943); PROSSER, TORTS 821-822 (1941); RESTATEMENT, TORTS §593 (1938).

[15] Tawney v. Simonson, Whitcomb and Hurley Co., 109 Minn. 341, 124 N.W. 229 (1909); GATLEY, LIBEL AND SLANDER 336-337 (4th ed. 1953); 53 C.J.S. LIBEL AND SLANDER § 132 (1948).

[16] Green, *Relational Interests,* 30 ILL. L. REV. 314, 335 (1935); Note, 45 ILL. L. REV. 525, 529 (1950).

[17] Green, *supra,* n. 16 at 336, and references cited n. 4, *supra.*

conclusion is supported by *Peter Walker v. Hodgson*,[18] wherein it is stated,

> Fair comment does not negative defamation, but establishes a defense to any action founded on defamation.

It is submitted that this is the correct view and that the non-defamatory terminology beclouds the issue.

Scope of Public Interest

The concept of what is within the public interest and hence an appropriate subject for fair comment is necessarily very broad and flexible. The development and growth of democratic institutions, expansion of public services, rise of economic specialization and interdependence of economic groups and regions, the development of mass communication media and transportation facilities, and the increase in leisure time have resulted in a tremendous widening of the area of public interest. Although today one immediately thinks of governmental affairs, public office holders and candidates as the focal point of public discussion, the earliest cases on the subject involved books and plays.[19] Criticism of the government was not always tolerated.

Books,[20] plays,[21] concerts[22] and public exhibitions of all kinds[23] were early forms of material submitted to the public for their approval or disapproval. In these instances it might literally be said that the contributors of this material invited criticism and discussion and should not complain if such were forthcoming. Today, with the tremendous impact of government on our daily lives, all

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[18] [1909] 1 K. B. 239, 253 per Buckley, L.J. *Cf.* Collins, M. R., delivering the judgment of the court in Thomas v. Bradbury, Agnew, Ltd., [1906] 2 K. B. 627, 638: "The dicta (of Blackburn and Crompton, JJ., in Campbell v. Spottiswoode, 3 B. & S. 769 (1863) no doubt assert the etymological inexactitude of the word 'privilege' as connoting a right to the public at large . . . . but they in no degree affect the standard by which the fairness of the comment is to be judged or relieve the commentator from liability, if the comment be malicious, if, indeed, it can then be described as comment at all. The right, though shared by the public, is the right of every individual who asserts it, and is, *qua* him, an individual right whatever name it be called by, ..."

[19] Hallen, *Fair Comment*, 8 Tex. L. Rev. 41, 44, 52 (1929).

[20] Parmelee v. Hearst Pub. Co., 341 Ill. App. 339, 93 N.E. 2d 512 (1950); Berg v. Printers' Ink Pub. Co., 54 F. Supp. 795 (S.D. N.Y. 1943), *aff'd* 141 F. 2d 1022 (2d Cir. 1944); Potts v. Dies, 132 F. 2d 734 (D.C. Cir. 1942), involved magazines; Dowling v. Livingstone, 108 Mich. 321, 66 N.W. 225 (1896).

[21] Cleveland Leader Printing Co., v. Nethersole, 84 Ohio St. 118, 95 N.E. 735 (1911); McQuire v. Western Morning News, [1903] 2 K.B. 100; Merivale v. Carson, 20 Q.B.D. 275 (1887).

[22] Cherry v. Des Moines Leader, 114 Iowa 298, 86 N.W. 323 (1901).

[23] Outcault v. New York Herald Co., 117 App. Div. 534, 102 N.Y. Supp. 685 (1907) (cartoonist); Battersby v. Collier, 34 App. Div. 347, 54 N.Y. Supp. 363 (1898); Thompson v. Shackell, M. & M. 187 (1828) (painting).

levels of public activity—local,[24] state,[25] and federal;[26] all branches—legislative,[27] executive,[28] judicial,[29] and administrative;[30] all office holders,[31] candidates,[32] appointed officials[33] and members of the armed forces,[34] may be legitimate subjects of public discussion. Naturally, all public schools,[35] teachers and coaches;[36] privately endowed and public supported colleges and universities;[37] work done by public contractors;[38] architecture, [39] charity drives[40] and even advertising campaigns of commercial enterprises;[41] ecclesiasti-

[24] Morgan v. Bulletin Co., 369 Pa. 349, 85 A. 2d 869 (1952); Griffin v. Opinion Pub. Co., 114 Mont. 502, 138 P. 2d 580 (1943); Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S.E. 2d 209 (1943); Metropolis Co. v. Croasdell, 145 Fla. 455, 199 So. 568 (1941).

[25] Cartwright v. Herald Pub. Co., 220 S. C. 492, 68 S.E. 2d 415 (1951); Caldwell v. Crowell-Collier Pub. Co., 161 F. 2d 333 (5th Cir. 1947); Bailey v. Charleston Mail Ass'n., 126 W. Va. 232, 27 S.E. 2d 837 (1943).

[26] Hall v. Binghamton Press, 263 App. Div. 403, 33 N.Y.S. 2d 840 (1942).

[27] Morgan v. Bulletin Co., 369 Pa. 349, 85 A. 2d 869 (1952); Hall v. Binghamton Press, 263 App. Div. 403, 33 N.Y.S. 2d 840 (1942).

[28] Caldwell v. Crowell-Collier Pub. Co., 161 F. 2d 333 (5th Cir. 1947).

[29] Kinsley v. Herald and Globe Ass'n., 113 Vt. 272, 34 A. 2d 99 (1943). However, liability will be imposed if the comment or criticism goes further than the occasion warrants.

[30] DeSavitsch v. Patterson, 159 F. 2d 15 (D. C. Cir. 1946). (Health Department and skill of doctor on hospital staff.)

[31] Lukaszewics v. Dziadulewicz, 198 Wis. 605, 225 N.W. 172 (1929); Walsh v. Pulitzer Pub. Co., 250 Mo. 142, 157 S.W. 326 (1913); Herringer v. Ingberg, 91 Minn. 71, 97 N.W. 460 (1903); Vance v. Louisville Courier-Journal Co., 95 Ky. 41, 23 S.W. 591 (1893).

[32] Cartwright v. Herald Pub. Co., 220 S. C. 492, 68 S.E. 2d 415 (1951).

[33] DeSavitsch v. Patterson, 159 F. 2d 15 (D. C. Cir. 1946).

[34] Foley v. Press Publishing Co., 226 App. Div. 535, 235 N. Y. Supp. 340 (1929), involved a navy court of inquiry into an airship disaster.

[35] O'Connor v. Sill, 60 Mich. 175, 27 N.W. 13 (1886) (School Sup't. criticized—not libelous).

[36] Hoepner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139 (1930) (Coach).

[37] Clark v. McBaine, 299 Mo. 77, 252 S.W. 428 (1923); Triggs v. Sun Printing and Publishing Co., 179 N.Y. 144, 71 N.E. 739 (1904); Cox v. Feeney, 4 F. & F. 13 (1863) (management of a college).

[38] Holway v. World Pub. Co., 171 Okla. 306, 44 P. 2d 881 (1935); Bearce v. Bass, 88 Me. 521, 34 Atl. 411 (1896).

[39] Soane v. Knight, M. & M. 74 (1827).

[40] Cox v. Feeney, 4 F. & F. 13 (1863); Campbell v. Spottiswoode, 3 B. & S. 769, 32 L.J.Q.B. 185 (1863).

[41] Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947) involved paid advertisements on political matters. Also Spanel v. Pegler, 70 F. Supp. 926 (D.C. Conn. 1946); Willis v. O'Connell, 231 Fed. 1004 (S.D. Ala. 1916); Crane v. Waters, 10 Fed. 619 (C.C.A. Mass. 1882) (Railroad promoter); Paris v. Levy, 9 C.B. (N.S.) 342 (1860). However, advertising by college boys trying to conduct a small scale legitimate radio repair business held not to render their service of sufficient public interest to permit adverse comment in Marr v. Putnam, 196 Ore. 1, 246 P. 2d 509 (1952).

cal affairs and the conduct of clergymen;[42] sanitation of living quarters supplied workmen in private industry;[43] public appeals for patronage or doctrinal acceptance such as the solicitation of funds for carrying on patent infringement litigation,[44] distribution of birth control literature,[45] or campaigns for evangelizing the Chinese;[46] labor disputes[47] and even the conduct of labor officials in relation to the selection of a convention site,[48] political beliefs of a lecturer,[49] and any newsworthy person[50] or organization[51] are all legitimate subjects of public discussion.

Statements of Fact. More difficult than the ascertainment of who or what is a proper subject for public discussion is the problem of the permissible extent of such discussion. Traditionally, fair comment and criticism meant just that and did not include misstatements of fact.[52] The criticism might be very severe, vituperative, and prejudiced and still be protected so long as there were no misstatements of fact.[53] That misstatements of fact are not protected is still the rule in England and the majority rule in the United States.[54] Conceptualistically, it seems to set a fair and just

[42] Klos v. Zahosik, 113 Iowa 161, 84 N.W. 1046 (1901); Shurtleff v. Stevens, 51 Vt. 500, 31 Am. Rep. 698 (1879); Kelly v. Tinling, 35 L.J.Q.B. 231 (1865); State Press Co. v. Willett, 219 Ark. 850, 245 S.W. 2d 403 (1952). (Liability imposed because of false misstatements of fact and actual malice.

[43] South Hetton Coal Co. v. North-Eastern News Ass'n., 69 L.T. 844 (1893).

[44] Kulesza v. Chicago Daily News, 311 Ill. App. 117, 35 N.E. 2d 517 (1941).

[45] Sutherland v. Stopes, [1925] A.C. 47.

[46] Campbell v. Spottiswoode, 3 B. & S. 769 (1863).

[47] Emde v. San Joaquin Central Labor Council, 23 Cal. 2d 146, 143 P. 2d 20 (1943).

[48] Flanagan v. Nicholson Pub. Co., 137 La. 588, 68 So. 964 (1915).

[49] Dilling v. Illinois Publishing Co., 340 Ill. App. 303, 91 N.E. 2d 635 (1950); Note, 45 ILL. L. REV. 525, 526 (1950).

[50] Oma v. Hillman Periodicals, 281 App. Div. 240, 118 N.Y.S. 2d 720 (1953); Thomas v. Hunt, 58 N.Y.S. 2d 754 (1945), *aff'd* 270 App. Div. 923, 62 N.Y.S. 2d 612 (1946); Brinkley v. Fishbein, 110 F. 2d 62 (5th Cir. 1940); *cert. denied* 311 U.S. 672 (1940).

[51] Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F. 2d 20 (10th Cir. 1952). Liability was imposed because fair comment was exceeded.

[52] Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 53 (1929).

[53] GATLEY, LIBEL AND SLANDER 354 (4th ed. 1953).

[54] Foltz v. News Syndicate, 114 F. Supp. 599 (S.D. N.Y. 1953); Marr v. Putnam, 196 Ore. 1, 246 P. 2d 509 (1952); Lubore v. Pittsburgh Courier Publishing Co., 101 F. Supp. 234 (D.D.C. 1951); Derounian v. Stokes, 168 F. 2d 305 (10th Cir. 1948); Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E. 2d 340 (1947); DeSavitsch v. Patterson, 159 F. 2d 15 (D.C. Cir. 1946); O'Regan v. Schermehorn, 25 N.J. Misc. 1, 50 A. 2d 10 (1946); Holden v. American News Co., 52 F. Supp. 24 (E.D. Wash. 1943); *appeal dismissed* 144 F. 2d 249 (9th Cir. 1944); Bell Publishing Co. v. Garrett Engineering Co., 141 Texas 51, 170 S.W. 2d 197 (1943); Cadro v. Plaquemines Gazette, 202 La. 1, 11 So. 2d 10 (1942); Martin v. Markley, 202 La. 291, 11 So. 2d 593 (1942); Potts v. Dies,

limitation on the freedom of comment, but practically it is difficult to apply. Idealistically, the rule that what applicable facts there are should be first truthfully stated and then the comment, criticism, or opinion added sets a high standard of fairness, but practically it may be too restrictive.

The traditional view excluding misstatements of fact from the defense of fair comment has been recently reiterated by the Supreme Court of Ohio:[55]

> What is privileged if that is the proper term, is the criticism or comment, not the statement of facts on which it is based. Generally speaking, comment or criticism must be founded on truth. While ordinarily it does not consist of the assertion of facts, an allegation of fact may be justified by its inference from other facts truly stated. The right to comment or criticize does not extend to, or justify, allegations of fact of a defamatory character. If the publication is not a comment or criticism, but a statement of fact, the rules to be applied to the nature of recovery are those applicable to any other case of defamation; if defamatory and false, it is actionable, although made in good faith, without malice, and under the honest belief that it is true. (quoted from 36 C. J. 1283).
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> No untruth can be the basis of fair criticism, and the expression of an opinion which carries with it the imputation of wrongdoing is as much libelous as a direct charge of wrongdoing. The statements of fact commented on must be true if the defense of fair comment and criticism is to be available.

The minority view extending the privilege to misstatements of fact at least so far as public officials and candidates are concerned has been recently expressed by a federal court in the following manner:[56]

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132 F. 2d 734 (D.C. Cir. 1942); *rehearing denied* 319 U.S. 762 (1943); Metropolis Co. v. Croasdell, 145 Fla. 455, 199 So. 568 (1941); Sweeney v. Caller-Times Pub. Co., 41 F. Supp. 163 (S.D. Texas 1941) applied Texas law that the rule is applicable if the charge would subject the official to removal from office had it been true; Cohalan v. N.Y. Tribune, 172 Misc. 20, 15 N.Y.S. 2d 58 (1939) (dictum); Edwards v. Derrick, 193 La. 331, 190 So. 571 (1939); Smith v. Pure Oil Co., 278 Ky. 430, 128 S.W. 2d 931 (1939); Von Lonkhuyzen v. Daily News Co., 195 Mich. 283, 161 N.W. 979 (1917); same case 203 Mich. 570, 170 N.W. 93 (1918); State Press Co. v. Willett, 219 Ark. 850, 245 S.W. 2d 403 (1952), discussed in a case note in 6 ARK. L. REV. 239 (1952). The note expresses an opinion that dictum in the case would not impose the restriction that the comment must be a *justifiable* inference from truly stated facts; Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 53 (1929); Noel, *Defamation of Public Officers*, 49 COL. L. REV. 875, 878 (1949).

[55] Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 375-377, 74 N.E. 2d 340, 346 (1947).

[56] Sweeney v. Patterson, 128 F. 2d 457 (D.C. Cir. 1942); *cert. denied* 317 U.S. 678 (1942).

> The cases are in conflict, but in our view it is not actionable to publish erroneous and injurious statements of fact and injurious comments or opinion regarding the political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made and no special damages results.... Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. Since Congress governs the country, all inhabitants, and not merely the constitutents of particular members are vitally concerned in the political conduct and views of every member of Congress. Everyone, including appellees and their readers, has an interest to defend, and anyone may find means of defending it. The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information.... Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended, if error subjects its author to a libel suit without even a showing of economic loss.

A dissatisfaction with the limitation on the majority view has been expressed by the Supreme Court of West Virginia:[57]

> The distinction between a statement with reference to private gossip and a scandal and one concerning an act of conduct of public interest is so palpable as to require no elucidation. Consideration of peace and order between individuals calls for repression and punishment of false and defamatory statements of fact concerning the private person. There are equally cogent reasons for liberality of statement in matters of public concern. A citizen of a free state having an interest in the conduct of the affairs of his government should not be held to strict accountability for misstatement of fact, if he has tried to ascertain the truth and, on a reasonable basis, honestly and in good faith believes that the statements made by him are true.
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> We restrict the rule as stated above to official acts done in the performance of a public officer's official duty.

A California case[58] illustrates a conscientious effort to distinguish between fact and opinion. This litigation involved the status of such assertions as "hired non-union drivers," "straight commission plan," "minimum wage guarantees wiped out," "status of drivers remained unchanged," and "destructive labor policy, unfair to organized labor." The charges were occasioned when the employer attempted to change the mode of milk distribution to

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[57] Bailey v. Charleston Mail Ass'n., 126 W. Va. 292, 27 S.E. 2d 837 (1943). W. Va. is unique in permitting a greater freedom of comment on public officials than on candidates for office.

[58] Emde v. San Joaquin County Central Labor Council, 23 Cal. 2d 146, 143 P. 2d 20, 150 A.L.R. 916 (1943).

make the deliverymen independent contractors. In deciding that the limits of fair comment had not been exceeded, the court concluded that "hired" was a matter of opinion and justified, that "non-union drivers" was permissible since two of the men never were union members and the third ex-union man had been dropped by the union when he participated in the new plan, that "a straight commission plan" was not a too inaccurate description of the new mode of operations, that "minimum wage guarantees were wiped out" was permissible comment since under the new plan there were no minimum wage guarantees, that the assertion that the "status of the drivers remained unchanged" was a mixed question of law and fact and within the realm of fair comment, and that "destructive labor policy" was merely a characterization of an employer who refuses to conduct his business in accord with union demands.

Accusations of Alien Ideologies. It would seem that in cases involving the imputation of fascism, naziism, and communism[59] there would be considerable opportunity for discussion of the fact versus comment distinction. Many of the cases, however, do not specifically consider this question. Although there is some authority both ways, the later cases tend to regard the accusation as one of fact.[60] Many are content to declare the accusations defamatory or capable of a defamatory meaning without discussing the question of fact or opinion.[61] On the one hand it has been asserted:

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[59] The term "communism" is herein used in the present day general connotation of the term, and means the Russian brand of communism or Bolshevism. It can be distinguished from the practices of such groups as the Amana Society. See 1 ENCYCLOPEDIA OF RELIGION AND ETHICS 358 et seq. (1908).

[60] Mencher v. Chesley, 297 N.Y. 94, 75 N.E. 2d 257 (1947); Utah Farm Bureau Federation v. National Farmers Union Service Corp., 198 F. 2d 20 (10th Cir. 1952). The matter is actionable because it is an attack on his private character, Devany v. Quill, 187 Misc. 698, 64 N.Y.S. 2d 733 (1946); Foltz v. News Syndicate, 114 F. Supp. 599 (S.D. N.Y. 1953).

[61] Watson v. Margiotti, 371 Pa. 188, 88 A. 2d 892 (1952); Jeffers v. Screen Extra Guild, 107 Cal. App. 2d 253, 237 P. 2d 51 (1951); Ward v. League for Justice, 57 Ohio L. Abs. 197, 93 N.E. 2d 723 (1950); *appeal dismissed* 154 Ohio St. 367, 95 N.E. 2d 769 (1950); Derounian v. Stokes, 168 F. 2d 305 (10th Cir. 1948); Burrell v. Moran, 52 Ohio L. Abs. 465, 82 N.E. 2d 334 (1948); Spanel v. Pegler, 166 F. 2d 298 (2d Cir. 1948); Oppenheim v. Gunther, 193 Misc. 914, 85 N.Y.S. 2d 210 (1948); Wright v. Farm Journal, 158 F. 2d 976 (2d Cir. 1947); Holden v. American News Co., 52 F. Supp. 24 (E.D. Wash. 1943); *appeal dismissed* 144 F. 2d 249 (9th Cir. 1944); Gallagher v. Chavelas, 48 Cal. App. 2d 52, 119 P. 2d 408 (1941); Levy v. Gelber, 175 Misc. 746, 25 N.Y.S. 2d 148 (1941); Kaminsky v. American Newspapers, 283 N.Y. 748, 28 N.E. 2d 971 (1940); *lower decis.* 258 App. Div. 1078, 18 N.Y.S. 2d 53 (1940); Washington Times Co. v. Murray, 299 Fed. 903 (D.C. Cir. 1924). That the defamatory character of the accusations is the same whether the statement describes the plaintiff as a communist or one having such sympathies and affiliations, see Mencher v. Chesley, 297 N.Y. 94, 75 N.E. 2d 257 (1947); Grant v.

> "The Nazi Trojan Horse" metaphor, like most metaphors, is not a proposition of fact. Unlike many metaphors, it implies in its context no proposition of fact which the context does not state. In some contexts, no doubt, "Nazi Trojan Horse" might mean a concealed participant in an armed Nazi invasion. *** No doubt "Nazi Trojan Horse" is a term of reproach. It expresses an unfavorable opinion of appellant's publication and, perhaps, of appellant as its publisher, because they praised Hitler, including an opinion that such praise shows Nazi sympathies. But in this context it expresses nothing more.[62]

On the other hand, it has been stated:

> Furthermore, to call someone or refer to him as 'communist dominated' is a statement of a bald and unambiguous fact. It is not a criticism or comment on acknowledged or accepted fact.[63]

Although it may be admitted that the status of one's mind is a matter of fact just as is the status of his digestion, it might still be questioned whether a rigid adherence to the rule that such accusations are statements of fact might not be too restrictive. The difficulty of proving the literal truth of such charges might well be insurmountable.[64] Is such a statement in reality anything more than an assertion that the orator believes that the accused individual favors alien ideologies and is conniving against the best interest of the United States? Even though the accusation is factual in form, should it not be interpreted to mean simply that the publisher so believes? Consider the decision of an Illinois court on a different matter of fair comment:

> We believe that the statements that plaintiff wrote disgusting and depraved books is a statement of Pegler's opinion of the books.[65]

Readers Digest, 151 F. 2d 733 (2d Cir. 1945); *cert. denied* 326 U.S. 797 (1946); Spanel v. Pegler, 70 F. Supp. 926 (D.C. Conn. 1946). That allegations of communism are not defamatory, McAndrew v. Scranton, 364 Pa. 504, 72 A. 2d 780 (1950), apparently overruled by Watson v. Margiotti, 371 Pa. 188, 88 A. 2d 892 (1952). Booker, *Accusation of Communism As Slander Per Se*, 4 DUKE BAR A.J. 1 (1954).

[62] Potts v. Dies, 132 F. 2d 734, 735 (D.C. Cir. 1942).

[63] Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F. 2d 20, 23 (10th Cir. 1952).

[64] The appellate judge seemed convinced of the truth of the charges in Holden v. American News Co., 52 F. Supp. 24 (E.D. Wash. 1943); *appeal dismissed.* 144 F. 2d 249 (9th Cir. 1944), but a jury verdict for the plaintiff was sustained. Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F. 2d 20 (10th Cir. 1952), discusses the effort made by the defendant to prove the truth of the charges and concludes that some of the excluded matter should have been admitted, but sustained a verdict for the plaintiffs, remarking that "lawsuits are not tried by a mathematical formula." 198 F. 2d 20, 24 (1952).

[65] Parmelee v. Hearst, 341 Ill. App. 339, 346, 93 N.E. 2d 512, 515 (1950).

The possibility of such an approach has been recognized but its application denied in some instances:

> Concededly, the word (communism) is carelessly and perhaps indefinitely used today. Nevertheless, there can be no denial that its appearance as a characterization in a newspaper political editorial is sufficient to destroy a person's presumably good reputation with the public.[66]

An indiscriminate acceptance of the doctrine that all such accusations of subversive or unacceptable beliefs are simply statements of opinion and therefore not actionable is equally as undesirable as treating them all as statements of fact and actionable. A charge unaccompanied by any facts may suggest to the recipient that the publisher has secret positive information that such is the fact. The result should depend upon the particular wording and context of the accusation. If certain facts are first accurately stated and a clear expression of belief based on those facts added, then it would seem that the publisher remains safely in the zone of opinion. Similarly, many of these accusations although factual in form, might be so coupled with supporting statements that they are obviously expressions of opinion.

Although Professor Hallen's predicted trend to the minority view extending the privilege to misstatements of fact has not materialized,[67] the soundness of that proposition is generally conceded.[68] The difficulties and uncertainties in the application of the fact versus opinion distinction make the role of the commentator a hazardous business. The difficulty of proving the literal truth of assertions concerning another's mental processes and subjective orientation would seem to necessarily discourage discussion on matters of vital interest. The desired flexibility can better be obtained not by reliance on the fortuitious circumstances of denominating accusations fact or comment but by reliance on the usual limitations of the law of conditional privilege.

Private character, morals, and motives. The majority of cases dealing with the defense of fair comment generally hold that the defense does not extend to attacks upon the private character,

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[66] Spanel v. Pegler, 160 F. 2d 619, 622 (7th Cir. 1947); Burrell v. Moran, 52 Ohio L. Abs. 465, 468, 82 N.E. 2d 334, 336 (1948).

[67] Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 70 (1929). A survey in 1949 indicated that the courts of 26 states and the District of Columbia have held or definitely stated that there is no privilege, while in only nine states have the courts held or clearly stated that there is a privilege. The author concluded that the privilege probably existed in four more states, probably did not exist in three more, and was still open in the remaining 6 states. Noel, *Defamation of Public Officers*, 49 COL. L. REV. 875, 896-7 (1949).

[68] Noel, *supra*, n. 67 at 897; Green, *Relational Interests*, 30 ILL. L. REV. 314, 347 (1935).

morals, and motives of the object of the discussion.[69] Similarly, it does not include false accusations of the commission of crimes including but not restricted to such crimes as misfeasance and malfeasance in office.[70] The following excerpts are typical:

> Nevertheless, the candidate does not surrender his private character to the public, and he has the same remedy for defamation, oral as well as written, as a private citizen.[71] Neither did it undertake to comment upon or criticize his literary productions or public addresses. Instead, its gist was to charge him with being disloyal to his country during a national crisis. It attacked him personally. It assailed his personal character in a vital manner quite apart from his literary productions or public addresses.... Publication of that kind is not privileged.[72]

There are, of course, exceptions to the aforementioned rules, and, in the application of the rules to the facts of each case there is room for considerable variation. The permissible area of comment should be limited by the extent of the public interest in each case rather than by arbitrarily excluding certain factors in every case. Thus, in a comment on the merits of a technical treatise the public interest would generally be limited to the accuracy, style, coverage and related matter of the presentation. It would seem that the private life, morals, and motives of the author would be of little or no consequence.[73] In comment on many other books, plays, art exhibits, and related matter the same limitations would

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[69] Preveden v. Croation Fraternal Union of America, 98 F. Supp. 784, (W.D. Pa. 1951); Potts v. Dies, 132 F. 2d 734 (D.C. Cir. 1942); *cert. denied* 319 U.S. 762 (1943); Post Publishing Co. v. Moloney, 50 Ohio St. 71, 33 N.E. 921 (1893). Attack on motives permitted if a reasonable inference from stated facts, Foley v. Press Pub. Co., 226 App. Div. 535, 235 N.Y. Supp. 340 (1929). Plaintiff was entitled to have jury pass on the patriotic aspect of his motives in advertising the "Bundles for Congress" campaign in Holden v. American News, 52 F. Supp. 24 (E.D. Wash. 1943); *appeal dismissed* 144 F. 2d 249 (9th Cir. 1944).

[70] Lubore v. Pittsburgh Courier Publishing Co., 101 F. Supp. 234 (D.D.C. 1951); *aff'd* 200 F. 2d 355 (D.C. Cir. 1952); Mencher v. Chesley, 297 N.Y. 94, 75 N.E. 2d 257 (1947); Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E. 2d 340 (1947); Cadro v. Plaquemines Gazette, 202 La. 1, 11 So. 2d 10 (1942); Edwards v. Derrick, 193 La. 331, 190 So. 571 (1939); Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 70 (1929).

[71] De Vany v. Quill, 187 Misc. 698, 64 N.Y.S. 2d 733, 739 (1946).

[72] Derounian v. Stokes, 168 F. 2d 305, 308 (10th Cir. 1948).

[73] His training, background and competence to write such a work would be a proper subject for comment. "The brains and equipment of an author have a definite relation to the work which he produces and so it is properly held that his mental characteristics may be freely commented upon." Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 85 (1929).

apply, but not necessarily in all of them.[74] The author of a history book, for example, might be a confirmed disciple of a foreign ideology, and he may have written a distorted text for the very purpose of undermining American institutions. In such a case would it not necessarily follow that the author's background, motives, and private life were all legitimate subjects of public interest? Similarly, depending upon the office held or sought, various aspects of the private life, morals, and motives of the office holder and candidate have a bearing upon his fitness for the particular public trust. In this area of defining the outward limits of the scope of fair comment it would seem that logical flexibility can best be achieved by a forthright examination of the relational interests involved.[75]

Malice. It is well established that malice on the part of the publisher defeats the defense of fair comment.[76] This is true whether fair comment is considered a part of the law of privilege or whether it is considered a distinct right.[77] Malice, of course, in this sense means "express malice," "malice in fact," or "more than merely doing an unlawful or injurious act."[78] "The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations."[79] It may imply a measure of hatred, ill will, contempt, or unjustifiable purpose.[80]

The presence of express malice defeats a conditional privilege

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[74] Attack on motives for writing a history book alleging the purpose was to compel the organization to pay for its publication was held not privileged in Preveden v. Croation Fraternal Union of America, 93 F. Supp. 784 (W.D. Pa. 1951).

[75] Noel, *Defamation of Public Officers*, 49 COL. L. REV. 875, 883 (1949); Hallen, *Fair Comment*, 8 TEX. L. REV. 81, 83 (1929).

[76] Caldwell v. Crowell-Collier Pub. Co., 161 F. 2d 333 (5th Cir. 1947); *cert. denied* 332 U.S. 766, (1947); State Press Co. v. Willett, 219 Ark. 850, 245 S.W. 2d 403 (1952), discussed in note, 6 ARK. L. REV. 239 (1952); Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S.E. 2d 209 (1943). Malice is generally treated as a question of fact to be determined by the jury, Foltz v. News Syndicate Co., 114 F. Supp. 599 (S.D. N.Y. 1953); Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F. 2d 20 (10th Cir. 1952); Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S.E. 2d 209 (1943). In cases of defamation actionable *per se*, the plaintiff need not prove actual malice to make out a prima facie case as the law will imply it. Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E. 2d 340 (1947).

[77] Thomas v. Bradbury, Agnew, Ltd., [1906] 2 K.B. 627; 53 C.J.S. LIBEL AND SLANDER § 132 (1948).

[78] Ryan v. Wilson, 231 Iowa 33, 51, 300 N.W. 707, 716 (1941).

[79] Swearingen v. Parkersburg Sentinel Co., 125 W. Va. 731, 26 S.E. 2d 209 (1943).

[80] YANKWICH, IT'S LIBEL OR CONTEMPT IF YOU PRINT IT 363 (1929); PROSSER, TORTS 849 (1941).

because the publication is privileged only if it is published for a justifiable purpose and with an honest and reasonable belief in its truth.[81] A federal court has expressed it thus:

> To qualify as fair comment a publication must have been upon a proper occasion, from a proper motive, in a proper manner and must have been based on reasonable or probable cause. The defendant has the burden of proving that the publications were so privileged.[82]

Express malice likewise defeats the defense of fair comment even though this defense is considered outside the scope of privilege. This result is achieved because the presence of malice renders unfair a comment prima facie fair.[83] An otherwise fair comment thus becomes unfair, malicious, libelous, and actionable.[84]

Fairness. The requirement of fair comment is satisfied if the comment has met the tests previously discussed.[85] These tests require that there be no misstatement of facts, no attack on the private life or morals of the subject of the discussion, no false allegations of crime, and no improper motive or presence of actual malice on the part of the publisher. As a jurisdiction extends the defense of fair comment to include one or more of these proscribed areas, *e.g.*, misstatements of fact, the test of fairness diminishes ultimately to a question of malice. The requirement of fairness generally seems to be satisfied as long as it is the honest opinion of the publisher.[86] It can be severe, exaggerated, and unreasonable and still be protected.[87] The language, however, must be such that it can fairly be called criticism rather than invective.[88] Judicial expressions include the following:

> By word and by pen the official record and pronouncements of a public man may be discussed and criticized, condemned and even vituperated, but the facts cannot be perverted with impunity.[89]

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[81] "The question whether the comment on or criticism of matters of public concern are fair and privileged, or malicious and libelous, is usually a question to be determined by the jury under all the circumstances." Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F. 2d 20, 22 (10th Cir. 1952); *Accord:* Preveden v. Croation Fraternal Union of America, 98 F. Supp. 784 (W.D. Pa. 1951); Caldwell v. Crowell-Collier Pub. Co., 161 F. 2d 333 (5th Cir. 1947); *cert. denied* 332 U.S. 766 (1947).

[82] Preveden v. Croation Fraternal Union of America, 98 F. Supp. 784 (W.D. Pa. 1951).

[83] Thomas v. Bradbury, Agnew, Ltd., [1906] 2 K.B. 627.

[84] FRASER, LIBEL AND SLANDER 107-110 (7th ed. 1936).

[85] DeSavitsch v. Patterson, 159 F. 2d 15 (D.C. Cir. 1946).

[86] Hall v. Binghamton Press, 263 App. Div. 403, 33 N.Y.S. 2d 840 (1942).

[87] Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 426 (1910).

[88] McQuire v. Western Morning News, [1903] 2 K.B. at 110; GATLEY, LIBEL AND SLANDER 355 (4th ed. 1953).

[89] Caldwell v. Crowell-Collier Pub. Co., 161 F. 2d 333 (5th Cir. 1947); *cert. denied* 332 U.S. 766 (1947).

> Criticism as to matters of public interest and concern is privileged so long as the criticism is fair with an honest purpose and not intemperate and malicious. The protecting privilege is not lost because the discussion brings embarrassment to the official.[90]
>
> Mere exaggeration, slight irony, or wit, or all those delightful touches of style which go to make an article readable, do not push beyond the limitations of fair comment. Facts do not cease to be facts because they are mixed with the fair and expectant comment of the story teller, who adds to the recital a little touch of his piquant pen.[91]

In consideration of the relationship between fairness and the permissible area of comment on such matters as facts, motives, and private character, it is obvious that there will be as many or more variations in this area as in those others. Thus, generalizing becomes hazardous and itemizing becomes monotonous. There are not only different rules to be applied in different jurisdictions, but also different approaches available in jurisdictions purporting to follow the same rules. Decisions on substantially the same language might be approached from the angle of whether it is capable of a defamatory meaning at all as well as from the angle of the permissible area of comment. This is well illustrated by the *Sweeny* cases.[92]

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[90] Hall v. Binghamton Press, 263 App. Div. 403, 33 N.Y.S. 2d 840 (1942).

[91] Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers, 260 N.Y. 106, 118, 183 N.E. 193, 198 (1932); quoted with approval in Hall v. Binghamton Press, 263 App. Div. 403, 410, 33 N.Y.S. 2d 840, 847 (1942); "It cannot be said that to headline an article as 'sell out' and to refer to plaintiff as defending a railroad against the citizens of the village, of which he is the village counsel, is merely slight irony or wit." Rathkopf v. Walker, 190 Misc. 168, 173, 73 N.Y.S. 2d 111, 117 (1947); *modified and aff'd* 274 App. Div. 1064, 85 N.Y.S. 2d 351 (1949).

[92] These cases are discussed in Noel, *Defamation of Public Officers*, 49 COL. L. REV. 875, 882 (1949). It is estimated that the plaintiff brought 75 or more actions against the defendant columnists, their syndicate, and papers because of statements indicating that the plaintiff opposed a judicial appointment on the basis that the intended appointee was Jewish and not born in the United States. Most of the suits were dismissed on the basis that the words were not capable of meaning that the plaintiff was motivated by Anti-Semitic motives, *e.g.* Sweeney v. Bacon Journal Publishing Co., 66 Ohio App. 475, 481, 35 N.E. 2d 471, 473; *appeal dismissed*, 138 Ohio St. 330, 34 N.E. 2d 764 (1941). A contrary view was reached in Sweeney v. Schenectady Union Publishing Co., 122 F. 2d 288, 290 (2d Cir. 1941); *aff'd* 316 U.S. 642 (1942); *rehearing denied* 316 U.S. 710 (1942); Similar approach: Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947). (Publication capable of charging plaintiff with communistic beliefs or sympathies and hence actionable); Spanel v. Pegler, 70 F. Supp. 926 (D.C. Conn. 1946). Hall v. Binghamton Press, 263 App. Div. 403, 33 N.Y.S. 2d 840 (1942), stating it was not disgraceful or odius for a Congressman to vote against the wishes of a majority of his constituents. This case construed the language as not charging plaintiff with being like Quisling but simply asking whether he was "going to take the

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Libel per se. There is considerable reference in reported cases in recent years to the concept of libel *per se*.[93] Historically, of course, there was no justification for this classification as all libel was actionable *per se* without proof of special damages.[94] Slander, on the other hand, was and is divided into slander *per se* and slander *per quod*.[95] This is significant because slander *per se* is actionable without proof of special damages whereas slander *per quod* requires proof of special damages before recovery is permitted. Instances of slander *per se* are generally restricted to imputations of a serious crime, loathsome disease, imcompetence to pursue

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line of least resistance and wind up with the Quislings." Allegations of greed of a public official held not defamatory in Hall v. Binghamton Press, 263 App. Div. 403, 33 N.Y.S. 2d 840 (1942). Statements blaming the mayor for terrorists' bombings held a criticism upon his law enforcement activities and not defamatory. Hoan v. Journal Company, 238 Wis. 311, 298 N.W. 228 (1941); *cert. denied* 314 U.S. 683 (1941); *rehearing denied* 314 U.S. 715 (1941). Hays v. American Defense Society, 252 N.Y. 266, 169 N.E. 380 (1929) concluded that the particular article did not charge plaintiff with being a radical, red, or one attempting to overthrow the government, but only charged him with being a member of certain organizations. Sack v. N.Y. Times Co., 56 N.Y.S. 2d 794 (Sup. Ct. 1945), *aff'd* 270 App. Div. 401, 59 N.Y.S. 2d 888 (1946), concluded that the article did not charge plaintiff with being a communist but only with defending communism in Russia. Allegation that an assistant county engineer was "cashiered" was held libelous *per se* since the language did not indicate an ordinary dismissal. Metropolis Co. v. Croasdell, 145 Fla. 455, 199 So. 568 (1941).

[93] Foltz v. News Syndicate, 114 F. Supp. 599 (S.D. N.Y. 1953); Marr v. Putnam, 196 Ore. 1, 246 P. 2d 509 (1952); State Press Co. Inc., v. Willett, 219 Ark. 850, 245 S.W. 2d 403 (1952); Lubore v. Pittsburgh Courier Publishing Co., 101 F. Supp. 234 (D.D.C. 1951); Ward v. League for Justice, 57 Ohio L. Abs. 197, 93 N.E. 2d 723 (1950); *appeal dismissed* 154 Ohio St. 367, 95 N.E. 2d 769 (1950); Burrell v. Moran, 52 Ohio L. Abs. 465, 82 N.E. 2d 334 (1948); Derounian v. Stokes, 168 F. 2d 305 (10th Cir. 1948); Babcock v. McClatchy Newspapers, 82 Cal. App. 2d 528, 186 P. 2d 737 (1947); Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947); Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E. 2d 340 (1947); DeVany v. Quill, 187 Misc. 698, 64 N.Y.S. 2d 733 (1946); Holden v. American News Co., 52 F. Supp. 24 (E.D. Wash. 1943); *appeal dismissed* 144 F. 2d 249 (9th Cir. 1944); Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F. 2d 20 (10th Cir. 1952); Watson v. Margiotti, 371 Pa. 188, 88 A. 2d 892 (1952); Metropolis Co. v. Croasdell, 145 Fla. 455, 199 So. 568 (1941); Smith v. Pure Oil Co., 278 Ky. 430, 128 S.W. 2d 931 (1939); G. M. McKelvey Co. v. Nanson, 5 Ohio App. 73, 24 Ohio Cir. Ct., N.S., 314, 26 Ohio Cir. Dec. 390 (1915); Tratnik v. Kalish, 5 Ohio App. 258, 27 Ohio Cir. Ct., N.S., 318 (1915); Carpenter, *Libel Per Se In California and Some Other States*, 17 So. CALIF. L. REV. 347, 356-67 (1944); Note 45 COL. L. REV. 525 (1950); 26 IOWA L. REV. 893, 895 (1941).

[94] Preveden v. Croation Fraternal Union of America, 98 F. Supp. 784 (W.D. Pa. 1951).

[95] RESTATEMENT, TORTS §§ 570, 575 (1938).

one's calling, and in some jurisdictions unchastity of a woman.[96]

In cases using the concept libel *per se*, it is likely that many of them mean simply that the language is defamatory on its face and that plaintiff need not resort to additional facts by way of inducement[97] or show the defamatory meaning by innuendo.[98] This, it is submitted is an historically incorrect use of the *per se* concept and is likely to lead to confusion although it would not do great violence to the traditional rules and distinctions between libel and slander. "A number of courts, however, apparently confusing the necessity of proof that the words have a tendency to defame with that of damage suffered as a result, have held that where such extrinsic facts are necessary to prove the imputation conveyed, libel is not actionable without proof of actual damage."[99] The effect of such decisions tends to equilivate actions of libel and slander in many instances and add unnecessary confusion.

The effect of the concept libel *per se* apparently results in

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[96] PROSSER, TORTS 798 (1941); RESTATEMENT, TORTS § 570 (1938).

[97] Prosser uses the term to mean that additional facts must be proved to show the defamatory meaning, PROSSER, TORTS 790 (1941).

[98] "An 'innuendo' in pleading in libel action is a statement by plaintiff of construction which he puts upon words which are alleged to be libelous and which meaning he will induce jury to adopt at trial." BLACK, LAW DICTIONARY, 970 (1933); Foltz v. News Syndicate, 114 F. Supp. 599 (S.D. N.Y. 1953), *held* that charges would constitute libel *per se* and would not need proof of special damages although an innuendo were necessary to make them defamatory. Marr v. Putnam, 196 Ore. 1, 246 P. 2d 509 (1952), *held* libel *per se* although the reference to plaintiff was by innuendo and special damages were not necessary. Libelous *per se* although innuendo needed, Tratnik v. Kalish, 5 Ohio App. 258, 27 Ohio Cir. Ct., N.S., 318, 27 Ohio Cir. Dec. 667 (1915). If the language is libelous *per se* an innuendo can be treated as surplusage, Westropp v. E. W. Scripps Co., 148 Ohio St. 365, 74 N.E. 2d 340 (1947). Babcock v. McClatchy Newspapers, 82 Cal. App. 2d 528, 186 P. 2d 737 (1947), *held* not libelous *per se* since innuendo needed to explain that the plaintiff was dishonest. The California statute provides: "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof . . . ." § 45 a CALIF. CIVIL CODE (Deering 1949).

[99] PROSSER, TORTS 797-8 (1941); Special damages must be alleged with particularity in cases of libel *per quod*. Parmelee v. Hearst Publishing Co., 341 Ill. App. 339, 93 N.E. 2d 512 (1950); Griffin v. Opinion Publishing Co., 114 Mont. 502, 138 P. 2d 580 (1943); Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S. 2d 544 (1940); O'Connel v. Press Pub. Co., 214 N.Y. 352, 108 N.E. 556 (1915). Cases asserting that special damages need not be proved if libelous *per se* are: DeVany v. Quill, 174 Misc. 698, 64 N.Y.S. 2d 733 (1946); Ward v. League for Justice, 57 Ohio. L. Abs. 197, 93 N.E. 2d 723, *appeal dismissed* 154 Ohio St. 367, 95 N.E. 2d 769 (1950); Levy v. Gelber, 175 Misc. 746, 25 N.Y.S. 2d 148 (1941), Americans For Democratic Action v. Meade, 72 D. & C. 306 (Pa. 1950).

immunity from liability on the part of the defendant in a number of instances involving the defense of fair comment.[100] This immunity results from the inability of the plaintiff to prove special damages resulting from the defamatory statements. The special damages recoverable must be pecuniary damages, and general loss of friends, prestige, or reputation is not enough.[101] This concept may result in non-liability even though the accusations are made carelessly and maliciously simply because the plaintiff is unable to prove the special damages required for recovery. Prima facie, it would also seem that liability might be extended in certain instances by the application of the libel *per se* doctrine. If the jurisdiction follows the view that statements of fair comment are not defamatory rather than defamatory but privileged, it would seem to follow that a ruling of libel *per se* necessarily would preclude any further defense of fair comment. Absent any other defense such as truth, the only question remaining would be the assessment of damages. Although specific authority for the foregoing statement is lacking, it would seem a logical conclusion from the approach that matters of fair comment are not defamatory. It has been pointed out,[102] however, that such statement probably means only that fair comment is not actionable defamation. Hence the defendant would still be allowed to prove that the statement was a comment on matters of public interest and published for a proper purpose and not maliciously. In any event the effect of the libel *per se* technique seems to be an unsatisfactory redelineation of the bounds of fair comment. Changes in the fair comment defense can best be achieved by a forthright extension, or restriction, if desired, of the conditional privilege.

Public Official Rule. A liberalizing tendency in the application of the doctrine of fair comment is evidenced in some jurisdictions by the application of what has been termed the "public official" rule." This term has apparently been coined by writers[103] as descriptive of a technique for extending immunity employed by a number of courts otherwise purporting to follow more traditional and strict rules of accountability. Its origin is apparently the dis-

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[100] Noel, *Defamation of Public Officers and Candidates*, 49 COL. L. REV. 875, 900 (1949). Charges of communism in 1940 not libelous *per se* and special damages needed. Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S. 2d 544 (1940). This case is apparently now overruled. Mencher v. Chesley, 297 N.Y. 94, 75 N.E. 2d 257 (1947); see also Griffin v. Opinion Publishing Co., 114 Mont. 502, 520, 138 P. 2d 580, 590 (1943).

[101] Parmelee v. Hearst Pub. Co., 341 Ill. App. 339, 93 N.E. 2d 512 (1950); O'Connel v. Press Pub. Co., 214 N.Y. 352, 108 N.E. 556 (1915); PROSSER, TORTS 805 (1941).

[102] *Supra*, text following n. 17.

[103] Noel, *Defamation of Public Officers*, 49 COL. L. REV. 875, 901 (1949); Note, 51 YALE L.J. 693 (1942).

senting opinion of Judge Clark in *Sweeny v. Schenectady Union Publishing Company*[104] wherein he states:

> The decision herein seems to me not in accordance with New York law, where the right of comment on a public official has been safeguarded in a practical way by "a somewhat different rule" than in ordinary cases and a "clear charge of corruption or gross incompetence holding one up to disgrace and contumely" is required; even an imputation of corrupt or dishonorable motives will be justified as fair comment if it is a reasonable inference from the facts.[105]

The public official rule has been said to be aimed entirely at the sufficiency of the complaint and apparently brings all cases involving less serious attacks within the concept of fair comment.[106]

This doctrine permits a wider area of public discussion in cases involving public officials and candidates than in other instances of fair comment. In that it achieves greater flexibility than rigid adherence to former preconceived strict rules it has considerable merit. Such flexibility, however, could more logically and clearly be achieved by the application of the conditional privilege theory.

Conclusion

In the formulation of appropriate rules governing defamatory actions involving the defense of fair comment on matters of public interest the courts and legislatures must reach a delicate balance between highly important public and private interests. The problem is, at the least, the proper reconciliation of the interest of the individual in preserving his good reputation and the interest of the public in preserving constitutional government, an important as-

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[104] 122 F. 2d 288 (2d Cir. 1941), *aff'd* 316 U.S. 642 (1942); *rehearing denied* 316 U.S. 710 (1942).

[105] Sweeney v. Schenectady Union Pub. Co., 122 F. 2d 288, 291 (2d Cir. 1941), *aff'd* 316 U.S. 642 (1942); *rehearing denied* 316 U.S. 710 (1942); Holloway v. Scripps Publishing Co., 11 Ohio App. 226, 30 Ohio Cir. Ct., N.S., 193 (1919), appears to be a forerunner of the Public Official Rule in that it held that written words of ridicule or contempt, which relate solely to political arguments on matters of public interest and which do not impute immorality or a violation of law, are not actionable without proof of special damage.

[106] Noel, *Defamation of Public Officers*, 49 Col. L. Rev. 875, 901 (1949). Bailey v. Charleston Mail Ass'n, 126 W. Va. 232, 27 S.E. 2d 837 (1943) extends the privilege to misstatements of fact in case of public officials. Allegations of greed in a Congressman held not defamatory in Hall v. Binghamton Press, 263 App. Div. 403, 33 N.Y.S. 2d 840 (1942). Apparently in Texas the charge to be actionable *per se* must be such that if true it would be cause for removal from office. Cotulla v. Kerr, 74 Tex. 89, 94, 11 S.W. 1058, 1059 (1889). *Cf.* Jenkins v. Taylor, 4 S.W. 2d 656, 659 (Tex. 1928) which states that the rule did not apply to a state legislator and Sweeney v. Collier-Times Pub. Co., 41 F. Supp. 163, 167 (S.D. Tex. 1941), applying the rule to a Congressman accused of anti-semitism.

pect of which is freedom of speech.[107] At the most it is the problem of preserving a republican form of government against an attack of conspirators dedicated to the destruction of existing institutions.[108] Too much disregard of the reputations of public officials and institutions may lead to a general lack of confidence occasioned by unscrupulous attacks designed at destroying the very things sought to be preserved. Too much concern over the individual's reputation may lead to a stifling of public discussion and information vital to the proper functioning of an enlightened electorate. Fortunately, in the United States the public has acquired a high degree of sophistication and tolerance in the evaluation of exaggerated charges and countercharges.

> In the earlier days of our national existence these editorials would have been considered mild. If the press or our citizens honestly believe that the acts of a legislative representative lend comfort to our nation's enemies there must be no question about the right to tell him just that in no uncertain terms. Queasy words will not do. How else can a democracy function? If the citizens believe such acts may be setting up a government of Quislings, they must have the right to say so. It is one of the verities of democracy that eternal vigilance is the price of liberty. The courts may not muzzle those who maintain such vigilance. Great issues require strong language. If a legislator's vote cannot be criticized as being opposed to the national interest, then there is no field of fair comment.[109]

From the very nature of the interests involved it is obvious that considerable flexibility is desirable. It is also apparent that considerable flexibility has been achieved. Flexibility results from both a variation in the applicable rules previously mentioned and from the application of the facts to the same rules. At the outset, for example, there is considerable leeway in the determination of whether the matter in litigation is defamatory at all. If the language

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[107] Post Publishing Co. v. Hallam, 59 Fed. 530 (6th Cir. 1893); Coleman v. McLennan, 78 Kan. 711, 98 Pac. 281 (1908); Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413 (1910).

[108] Riesman, *Democracy and Defamation: Fair Game and Fair Comment I and II*, 42 COL. L. REV. 1085 and 1282 (1942). "To hold that calling one a communist is slander would unwittingly entrap the unwary, for nothing would please communists better than to enable them to institute suits for damages promiscuously, regardless of the ultimate outcome. It has been amply demonstrated that it is part of communist doctrine and strategy to make the courtroom its forum for propaganda purposes. (See AMER. BAR ASS'N., REP'T. OF THE SPECIAL COMMITTEE ON COMMUNIST TACTICS, STRATEGY AND OBJECTIVES, Feb. 27, 1951)." Keefe v. O'Brien, 203 Misc. 113, 116 N.Y.S. 2d 286, 288 (1952). Note that the New York Court is distinguishing between a written and a spoken charge of communism. See Mencher v. Chesley, 297 N.Y. 94, 75 N.E. 2d 257 (1947).

[109] J. Bliss concurring in Hall v. Binghamton Press, 263 App. Div. 403, 33 N.Y.S. 2d 840, 849 (1942).

is unambiguous, the court shall decide whether it is defamatory or not.[110] If the language is susceptible of two meanings, one defamatory and one not, then the question of defamation is for the jury.[111] Thus depending upon the time, place, and manner of expression, it is possible for allegations of communism to be held not defamatory at all,[112] capable of a defamatory meaning and hence a proper subject for the jury's determination,[113] or defamatory as a matter of law.[114] In many instances the language will be so clearly either fact or opinion that the court will decide as a matter of law that the matter is one or the other, whereas in other instances it will be proper for the jury to decide whether the statements are facts or comments.[115] The truth of the facts stated may be held

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[110] Dressler v. Mayer, 22 N.J. Super. 129, 91 A. 2d 650 (1952).

[111] Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947); Bousevine v. Norristown Herald, 351 Pa. 634, 41 A. 2d 736 (1945) *cert. denied* 326 U.S. 724 (1945); Theodore v. Daily Mirror, 282 N.Y. 345, 26 N.E. 2d 286 (1940). Sufficient to go to jury on misfeasance in office); Hartzog v. United Press Ass'ns., 202 F. 2d 81 (4th Cir. 1953).

[112] McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 72 A. 2d 780 (1950); *apparently overruled* by Watson v. Margiotti, *infra*, n. 114, and *distinguished* in Americans for Democratic Action v. Meade, *infra*, n. 114.

[113] Mencher v. Chesley, 297 N.Y. 94, 75 N.E. 2d 257 (1947); Gallagher v. Chavalas, 48 Cal. App. 2d 52, 119 P. 2d 408 (1941); Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S. 2d 544 (1940), (complaint dismissed because no special damages averred).

[114] Utah State Farm Bureau Federation v. National Farmers Union Service Corp., 198 F. 2d 20 (10th Cir. 1952); Watson v. Margiotti, 371 Pa. 188, 88 A. 2d 892 (1952). The case did not mention but probably overruled McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 72 A. 2d 780 (1950), *supra*, n. 112; Americans For Democratic Action v. Meade, 72 D. & C. 306 (Pa. 1950). This case distinguished McAndrew v. Scranton Republican Publishing Co., 364 Pa. 504, 72 A. 2d 780 (1950), *supra*, n. 112; Ward v. League for Justice, 57 Ohio L. Abs. 197, 93 N.E. 2d 723 (1950); *appeal dismissed* 154 Ohio St. 367, 95 N.E. 2d 769 (1950); Burrell v. Moran, 52 Ohio L. Abs. 465, 82 N.E. 2d 334 (1948); Oppenheim v. Gunther, 193 Misc. 914, 85 N.Y.S. 2d 210 (1948); Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947); Spanel v. Pegler, 70 F. Supp. 926 (D.C. Conn. 1946); Wright v. Farm Journal, 158 F. 2d 976 (2d Cir. 1947).

[115] "We cannot say as a matter of law that such expressions are statement of fact, nor can we determine as a matter of law that they are unfair comment upon facts pleaded as true." Foley v. Press Pub. Co., 226 App. Div. 535, 235 N.Y. Supp. 340, 356 (1929). In jurisdictions permitting the "rolled-up" plea the function of the jury is somewhat enlarged. This plea is in essence the defense that what facts are stated in the publication, are true and what opinions are expressed are fair comment on such facts. In England, where the plea originated the defendant need not single out what statements are fact and what are opinion. The defense constitutes but a single plea and not two defenses of justification and fair comment. Except for New York and New Jersey this plea has received little attention from the American courts. See Note, 49 COL. L. REV. 583 (1949) and cases cited therein; Foerster v. Flynn, 193 Misc. 373, 84 N.Y.S. 2d 297 (1948),

sufficient if they are substantially true rather than literally true.[116] Also, on the issue of malice there is considerable opportunity for different results.

In consideration of the important issues involved, the desirability of maintaining a degree of flexibility, and the advantages to be derived from a uniform approach and terminology, it is believed that the suggestions of Professor Hallen and other writers favoring adoption and extension of the conditional privilege rationale is meritorius.[117] Extension of the privilege to include misstatements of fact and even attacks on the private character, motives, and morals of the individual where they are legitimate subjects of public interest is desirable. Extension of the privilege in this manner would not unduly hazard the reputation of everyone to reckless and indiscriminate accusations. Express malice would defeat the conditional privilege and render the defamer liable. Hence, if there were not an honest and reasonable belief in the accusations, liability would result. Want of probable cause and lack of an honest belief based on reasonable foundations would be evidence of malice.[118] Furthermore, if the facts, morals, or motives were of no concern to the public as not being sufficiently related to the recognized matter of public interest, then the basis for the privilege would not be established and the defense would be defeated. The difficulty of proving the truth of many of these items which are of legitimate concern to the public can clearly tend to stifle discussion if the publisher is to be subject to a suit for defamation unless he unequivocally prove the veracity of the charges.

The assimilation of the defense of fair comment into the law of conditional privilege and the extension of the privilege as suggested would also render unnecessary in this area any further

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requiring the defendant to separately state the defenses of fair comment and justification; Foley v. Press Pub. Co., 226 App. Div. 535, 235 N.Y. Supp. 340 (1929), and O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 50 A. 2d 10 (1946), approving the "rolled-up" plea but holding that it was not properly pleaded. The inconsistent position of the New York courts is discussed in the COL. L. REV. note, *supra*, this note. GATLEY, LIBEL AND SLANDER 345 (4th ed. 1953).

116 Shields v. Chilton Co., 255 App. Div. 985, 8 N.Y.S. 2d 276 (1938), *rehearing denied* 256 App. Div. 820, 9 N.Y.S. 2d 582 (1939); Fort Worth Press Co. v. Davis, 96 S.W. 2d 416 (Tex. Civ. App. 1936).

117 Noel, *Defamation of Public Officers*, 49 COL. L. REV. 875, 900-1 (1949).

118 " . . . but malice may be shown by many things — the vigor of the attack, the failure to investigate the truth of the charge, the lack of a bona fide belief, and above all by an excessive publication." Green, *Relational Interests*, 30 ILL. L. REV. 314, 327 (1935). "With clear misstatements and erroneous interpretations of official reports, the question of malice becomes a significant one." DeSavitsch v. Patterson, 159 F. 2d 15, 16 (D.C. Cir. 1946).

development of the libel *per se* doctrine and the public official rule. Flexibility and development would be more orderly and logical. Reform of what might be considered unwarranted distinctions between libel and slander can best be worked out by considering the problem as a whole and not by haphazardly obliterating boundaries through development of the libel *per se* doctrine.